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Scholarly Writing: Ideas, Examples, and Execution

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CHAPTER 1

INTRODUCTION TO SCHOLARLY WRITING

Writing a scholarly legal research paper requires you to develop and defend a thesis on a legal topic. You may have already been exposed to scholarly writing through readings assigned in your law school classes, law review articles you discovered while researching for a legal research and writing assignment, or background research to help you get a sense of the legal issues in an upcoming project at work. Most law schools require upper-level and graduate-level students to write a thoughtful scholarly piece through a student-run journal, a research seminar, or an independent legal research and writing project. These types of projects call upon student authors to demonstrate their abilities in advanced legal research and sophisticated legal analysis.

You may find this project intimidating. Your first step is to mentally prepare yourself to work through the process of writing a scholarly paper. Writing a scholarly paper is a long-term project that requires a great deal of time; you need to develop your ideas and understand your topic to be able to successfully complete your scholarly paper. Think of it as you would any activity that requires a long training period, such as running a marathon, losing weight, or entering a competitive hot dog eating contest. You would not just wake up one Saturday morning and decide to go run a marathon with no training or preparation. If you have a goal to lose 50 pounds, you cannot lose it all in one day. Similarly, you have little chance of doing well at competitive hot dog eating if you do not get your body used to consuming lots of dogs fast, and get control over your gag reflex. All of these endeavors require planning and preparation.

A good way to get started is to jump ahead and think about what awaits you at the end—what will your finished paper look like? One way to visualize what your scholarly paper will look like is to look at samples of student-written scholarly papers to get a concrete sense of your end goal. Start with the full-text versions of the samples used in this book or look at the most recently published volume of your journal. If you are in a seminar class or a thesis program, your professor may have sample papers from former students to share

with you. There might also be student notes cited in casebooks from your favorite classes, which you may find particularly interesting because of your interest and background in the area. Looking at completed student works can make you familiar with the expectations for this type of writing, including what is required as far as organization, length, and the number of footnotes. As you read through these papers, think about things you like or dislike about them, and file these reactions in your mind to guide your thinking about your own scholarly paper.

If you take the time to prepare and train for your scholarly project, the experience can be enjoyable—or at least not miserable! This chapter starts at the beginning of your preparation and takes you through the basics you should know before you begin work on your scholarly project, including the considerations to keep in mind throughout your project. We conclude this chapter by describing the scholarly writing process as an overview to the material covered in this book.

Approaching Your Scholarly Writing Project

You are probably familiar with practical legal writing from previous coursework, work experience, or both. In practical legal writing, you are almost always arguing about how the law should be applied to a particular set of facts, or for an outcome based on that application. Your arguments are, for the most part, bound by existing law, unless you are in the rare situation where you are arguing for an exception or a rule change.

Constructing a scholarly paper is different from writing memoranda, briefs, and letters because it is your opportunity to put forth your own thoughts on a topic of your choice. The challenge, however, is that to do this you must become expert on the idea you plan to write about. It may be helpful for you to think about your previous writing projects, and understand how this scholarly writing project is similar or different. You may have written an advanced research paper where you had to come up with an original idea and then explain and defend it; this type of project is similar to the scholarly writing task you have in front of you. If your habit has been to write a paper the night before it was due or to take a weekend to write a paper start to finish, know that you will not be able to complete this type of project in that time frame. You will do yourself a disservice if you fail to recognize the nature of this project and the time and effort it will take to successfully complete it.

As a starting point, a scholarly paper needs both a topic and a thesis to become a project worth writing. Your topic is, of course, the subject area or legal

issue your paper addresses. A thesis is a statement of your position on the topic. You need to say something original in a scholarly paper, not just offer an explanation or synthesis of a legal issue. In scholarly writing, the law is just your starting point; what you do with it or say about it is boundless. Thus, a scholarly paper is an opportunity for you to not only choose what to write about, but to choose what you want to say about a topic. That is the beauty of this project; it is yours to say what you want to say. You just have to be sure to say something, or in other words, have a thesis.

Ideally, your thesis will be a one-sentence statement of your position: a statement that includes the basis for your position and why your position is valid. A thesis can take a variety of forms including an argument for why something should be changed, why something has happened, how to solve a problem, or why an existing solution will not work. You should start thinking about your topic and thesis as two different things. We will return to this in greater detail in Chapter 2.

Variations on Scholarly Papers

There are many terms used to describe a piece of scholarly writing, beyond the generic terms "scholarly paper" or "legal research paper." If you are writing a paper for a law school class, these are the terms you will likely use. If you are writing for a journal, there is a wide variety of terms used to describe published papers. They include labels such as Note, Comment, Essay, Casenote or Case Note, Case Comment, Article, and Thesis. There are fewer forms of scholarly papers than there are terms to describe them simply because different publishers use different terms for the same type of paper. Generally, papers published in law reviews and journals fall into one of two broad categories: non-student-written and student-written. Non-student authors include law professors, practitioners, judges, and other post-J.D. authors.[1] These non-student authors' scholarly papers are generally published as articles, but may also be published as essays.[2] Law reviews and journals may publish other types of writing including book reviews and commentaries on recent cases.[3]

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1. *See, e.g.*, Nestor M. Davidson, *The Problem of Equality in Takings*, 102 Nw. U. L. Rev. 1 (2008) (professor); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 Stan. L. Rev. 737 (2002) (judge).

2. *See, e.g.*, John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 Geo. Wash. L. Rev. 904 (2009).

3. *See, e.g.*, Peter H. Schuck, *Is a Competent Federal Government Becoming Oxymoronic?*, 77 Geo. Wash. L. Rev. 973 (2009) (book review); Recent Case, *Constitutional Law—Free Speech—D.C. Circuit Upholds Access Restriction to Military-Run Newspapers on Forum Analy-*

As a student-author, how do you know what type of paper you are writing? Some commonly used terms for a student-written scholarly paper are note, comment, casenote, case comment, essay, and to some extent, article.[4] For example, if you look at the Table of Contents in a recent *Harvard Law Review*, you will see the student works categorized as Notes and the non-student works categorized as Articles,[5] but if you look at the *California Law Review*, you will see the same type of student scholarly works categorized as Comments and the non-student works categorized as Articles.[6] Thus, journals use the terms "note" and "comment" interchangeably. The only real difference between these papers and "articles" is authorship, although articles are often longer than notes and comments, and law reviews commonly publish more notes or comments than articles per issue.[7]

A scholarly paper that is focused on a discussion and analysis of a recent case is called a Case Note or Case Comment.[8] Students may be assigned a particular case and told to write an analysis of the opinion including a summary of the case and the author's view of its potential effects. These papers are likely restricted in content, but they do require a thesis. Also keep in mind that case

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sis Grounds.—Bryant v. Gates, 532 F.3d 888 (D.C. Cir. 2008), 122 HARV. L. REV. 2250 (2009).

4. *Harvard Law Review, Columbia Law Review, New York University Law Review, Cornell Law Review, Texas Law Review, Michigan Law Review and Stanford Law Review* use "Note" to describe student written pieces while *California Law Review, University of Pennsylvania Law Review, University of Chicago Law Review, UCLA Law Review, and Northwestern Law Review* use "Comment." *Yale Law Journal* uses both "Note" and "Comment" to describe student-written pieces.

5. *See, e.g.*, Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140 (2009); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009) (article).

6. *See, e.g.*, Lindsay Crawford, Comment, *No Way Out: An Analysis of Exit Processes for Gang Injunctions*, 97 CAL. L. REV. 161 (2009); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CAL. L. REV. 95 (2009) (article).

7. Articles generally range from 23,000 words to 36,000 words, and notes or comments generally range from 10,000 words to 16,000 words. *See, e.g.*, Mark Angehr, Comment, The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions, 103 Nw. U. L. REV. 1007 (2009) (comment; approximately 14,000 words); Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CAL. L. REV. 1 (2009) (article; approximately 23,500 words).

8. *See, e.g.*, Recent Case, *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts.*—Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005), and Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596 (2006).

notes and case comments may be published as "notes" or "comments," just as Natalie's Case Note was published as a Note.

An Essay is a term used for relatively shorter scholarly pieces, and essays may be written by professors, practitioners, judges, or students.[9] Some law reviews require their members to write both a note or comment, and an essay. Essays are usually shorter than notes or articles, but they generally have the same research and attribution requirements. Essays may also be published as a group where numerous authors weigh-in on a predefined topic. The primary distinction, then, is that an essay is shorter than a note or article.[10] Based on a review of several recently published essays, we can tell you that generally an essay is half the length of an average note. Individual journals may set specific limits.

The term "thesis" (when referring to a full-blown paper) in the law school context is generally reserved for LL.M. scholarly works. If selected for publication, a thesis would likely be categorized as an article,[11] rather than a note or comment, because even though the thesis is a student-written work, the author is a post-J.D. student.

Simple enough, right? There are a few other things to keep in mind with these basic categorical distinctions. Student-written works published by non-journal members may be categorized as articles because notes or comments are reserved for the journal's student members. This depends on the journal's internal publication procedures. Also, keep in mind that you may try to publish your piece after graduation, which may put your scholarly paper into the "articles" category, even though you wrote the paper as a student.

Does any of this matter? For the most part, not really! If you are unsure whether you are writing a note, a comment, a case note, or an article, there is no need to panic. They are all variations of the same thing: a scholarly paper that follows the basic structure we discuss throughout the book. We use the term "note" to describe these student-authored scholarly papers. Where appropriate, we will refer to the other types of scholarly papers when there is some-

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9. *See, e.g.*, Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008) (professor); Julian Helisek, *The Fault, Dear PCAOB, Lies Not In the Appointments Clause, But In the Removal Power, That You Are Unconstitutional*, 77 GEO. WASH. L. REV. 1063 (2009) (student).

10. Student-written essays generally range from 5,000 words to 8,000 words and professor-written essays are usually, though not always, longer. *See, e.g.*, Helisek, *supra* note 9 (approximately 7,000 words); Duffy, *supra* note 2 (approximately 8,700 words); Alfieri, *supra* note 9 (approximately 16,300 words).

11. *See, e.g.*, Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

thing specific worth mentioning. Keep in mind any restrictions you have on your project, such as seminar topic or length, and adjust our guidance as needed to meet those restrictions. Generally speaking, you can take our guidance on writing a scholarly paper and apply it in whatever context you are writing your scholarly project.

Considerations for Your Scholarly Project

No matter what label fits your scholarly project, you may find it helpful to get a sense of the context in which you will write your paper and what things you should consider as you prepare for and work on your project. These considerations include supervisory resources, audiences, project planning, and personal motivation. We will cover these items in more detail in later chapters, but we introduce them now as guidelines for your project.

Supervisory Resources

The amount of supervisory oversight given to your paper will vary. Most students who earn academic credit for their scholarly writing project will have to work with some type of faculty supervision. A faculty supervisor may be assigned to you, or you may have to go recruit a faculty supervisor yourself. In a seminar course, you will have a professor who is an expert on the seminar topic area, but the seminar classes will probably not cover the writing process. Your professor's priority will be to cover the substantive issues of the seminar, not to teach writing. In other contexts, such as writing a thesis or a journal note, you may have a designated co-requisite course to address writing, and then also have a faculty advisor working with you on the substantive aspects of your paper. You may also have a senior student working with you on your scholarly project, especially if you are writing a note for a law journal. If you are writing a paper for a journal that is entirely student-run and non-credit bearing, you may have no formal faculty oversight; the student supervisor may be the only authority you have.

As soon as you learn that you are writing a scholarly paper, find out what level of faculty supervision or advising you will receive. If you are writing a paper in a seminar, find out how involved your professor will be in your writing project. For example, you may have to get approval on a topic, but you will mostly work independently on the paper. If you are writing a paper as an independent writing project, a thesis, or a journal note, find out whether an advisor is assigned to you or you are responsible for seeking out someone who will agree to be your advisor.

Finding an advisor on your own can be a challenge, but it can be beneficial to have the ability to control who is working with you on your paper. Do not just ask anyone; ask someone you want to work with. Maybe you got to know one of your professors through office hours, and you enjoyed that one-on-one time with the professor. Maybe you have an interest in writing on an international law topic, and there is a world-renowned international law expert on your school's faculty. You will spend a lot of time working with your advisor, so make this a thoughtful decision.

You should also think about the type of relationship you want to have with your advisor. You can think about advisor-advisee relationships as three general types: heavy-handed, barely-there, and a hybrid. The heavy-handed advisor will want to be actively involved in your scholarly writing process, and may even direct you on your topic and thesis. A heavy-handed advisor may be less flexible in letting you develop your ideas, and instead stick to predetermined thoughts, ideas, or conclusions based on his expertise in the area. A heavy-handed advisor will also set interim deadlines, and expect you to meet them with high quality submissions.

There are both drawbacks and advantages to a heavy-handed advisor. The heavy-handedness may seem somewhat paternalistic to you, but it is intended solely to help you complete this large and lengthy project. A heavy-handed advisor is also likely to be a strong cheerleader for you when you do come up with a great thesis and turn in a quality draft, letting you know you are doing good work and giving you constructive guidance to move forward. Truth is, a heavy-handed advisor is probably hard to come by; if you get an advisor this interested and engaged, you should consider yourself lucky.

The barely-there advisor is going to be fairly laid-back during your scholarly writing process. The barely-there advisor will be interested in the final product, but not so much in the interim work along the way. Likewise, the advisor may let you figure things out on your own and work at a pace that is comfortable for you. This independence gives you flexibility and control over the development of your scholarly writing project. Still, the barely-there advisor will read the final paper and grade it. The drawback to the laid-back advisor is obvious; you might not get as much guidance and support as you need or want. You may even find someone who is willing to be your advisor, but is up front about the fact that she will grade the project, but will not be available much during the writing process.

A hybrid advisor is probably an ideal supervisor for many students, striking a balance between the heavy-handed and barely-there advisors. The hybrid advisor probably knows when to back off and let the student figure things out, and also knows when to give the student specific directions for moving forward. The hybrid advisor may not be able to provide detailed comments on every

interim assignment, but the advisor will take care to provide the student with enough to keep the student on the right track.

Start talking to possible advisors only after you have thought about the characteristics of these three types of advisors and evaluated what you want out of an advisor-advisee relationship. Be honest with yourself and with the professors; the advisor-advisee relationship is for you. True, advisors can have rewarding experiences working closely with students (we can attest to that!), but finding a good advisor is not about making the advisor happy. Take the time to talk to different professors and avoid rushing around at the last minute when you might just settle for anyone who agrees. We further discuss the relationship between you and your supervisor in Chapter 6.

Ask other students about their experiences working with professors on seminar papers, journal notes, theses, and independent writing projects.

Primary and Secondary Audiences

Scholarly writing involves both primary and secondary audiences. Your primary audience includes all the people who are required to read your paper, for a variety of reasons: your professor grading your paper, peers in your seminar class or on your journal, or journal editors. This is the ultimate audience you need to satisfy. You need to know and meet their expectations on everything from arguments and assertions to technical and formatting matters.

You can be less concerned with the expectations of your secondary audience, but be mindful that various secondary audiences can exist. For example, your secondary audience includes people who read the paper just because it sounds interesting to them. Your secondary audience may include practitioners if your paper is published in a practitioner-directed journal. Students, professors, and research assistants may read your published paper when doing their own research. Potential employers may review your paper as part of your application. Finally, your family and friends may also want to read your paper, and you may be able to count on having a secondary audience of at least one: your mom.

Family notwithstanding, the primary and secondary audiences share common characteristics. Most of these readers are probably lawyers or lawyers-in-training; they are analytical, critical, and want to understand what you are

saying. They are easily irritated by unclear thesis statements or a failure to fully defend a well-crafted thesis; they are shocked by obvious flaws in analysis left unresolved. They are likely reading your paper for their own purposes—to determine your grade, to decide whether to publish your paper, to consider how to make a policy argument in a brief, or perhaps to get up to speed on a recent development in the law. They might be reading your paper as a springboard to something else, but they do not want to do any work to figure out what you are saying. We will return to talk more specifically about audience in several places where specific choices require consideration of your audience.

Planning Your Project

Planning for your scholarly project is essential to successful completion of your project, given the size of the paper and the length of time you have to work on it. As soon as you can, find out when your final scholarly project is due and whether you have to submit any interim assignments. The standard set of benchmark assignments includes a topic statement, outline, first draft, revised draft, final draft, and polished paper (the paper you will submit for credit). Your supervisor may ask for all of these benchmark assignments, or none of them, save for the final paper. The interim assignments, in our experience, are essential to success because the size of your paper and the length of time available to work on the project can be overwhelming. Instead of thinking about your project at the broad level of having a 50-page paper due in eight months, breaking up the project into manageable pieces will help you stay committed to and excited about the project.

Once you have broken up your project into manageable pieces, you need to follow deadlines for each piece, whether self-imposed or set by your supervisor. If you are setting your own schedule, you might want to give yourself about a month for each interim assignment, with perhaps an extra few weeks in the beginning to develop a topic statement. You can get a sense of when you will need to plan for large blocks of time to work on your scholarly writing project if you set out the big picture deadlines in a way that helps you stay organized.

After these deadlines are set, take the time to note them in your calendar. This will help you see where approaching deadlines conflict with other assignments or responsibilities (or other things like your sister's wedding or the Super Bowl). You should be rigid about following these deadlines, even if they are self-imposed or you are working with a supervisor who is generous with extensions. You can always move ahead if you make your deadlines in advance, but it can be hard (and stressful) to recover after you get behind.

Because your work on your scholarly paper will likely span two semesters, you will be well served to spend time planning out the project and incorporating the deadlines into your calendar. This will make the entire project more manageable and less daunting.

You can also use technology to plan your project. Consider using a paper calendar or the calendar function on your cell phone or PDA. You can also use Google Calendar, which has the added benefit of being accessible anywhere with internet access. You can share your Google Calendar if there are other people you want to be aware of your commitments or schedule. You can set auto reminders to notify you 1–2 weeks in advance of a deadline to make sure you have enough time to react to the reminder and meet your deadline.

Setting Yourself Up for Success

Different students will have different standards for what constitutes a successful scholarly writing experience. As a new scholarly writer, you need to establish what success means for you and think about how your strengths and limitations as a writer will affect your ability to achieve it.

Think about the aspirations you have for your scholarly paper. Are you excited about the opportunity to write about a topic of your choosing? Are you already thinking about a journal in which you would like to be published? Do you intend to meet the minimum requirements to earn credit, but do nothing further? Success can mean anything from publishing in a top law review to fulfilling a graduation requirement to winning a prestigious writing competition. In order to set yourself up for success, you need to reflect upon your ultimate goal.

Whether your goal for the paper is lofty or merely achievable, you will still have to spend time and effort completing this project. This time and effort will be well-spent if you possess some self-awareness about your strengths and weaknesses as a writer. For example, if you know you write best in the morning, you can schedule your writing time on your calendar accordingly.

If you know that you tend to procrastinate, you might set pre-deadlines for yourself, so you have an extra 2–3 day window before the actual deadline. Taking time for self-assessment is critical to a successful writing project because it can help you recognize potential issues in advance when you have time and energy to take action.

At this point, you should have a good sense of what it means to take on a scholarly writing project. Now, think about your personal goals for the project and what issues you can anticipate even at this early stage in the writing process.

Chapter 1 Checklist

- What are my goals for the paper?
- What are my deadlines and interim assignments?
  - How much time do I have between deadlines?
  - Is there a major event on my calendar that I will have to work around?
- What about this process do I find most and least daunting?
- What can I learn from past writing projects?
  - In other writing projects, what part of the work do I most look forward to (editing, revising, getting something down on paper/computer)?
  - What part do I want to avoid (same list of options)?
  - Where do I get stuck (getting started, picking up after a break, footnotes, etc.)?
- What other issues and obstacles can I anticipate and address at this stage?
- What other people can I use as resources during the writing process (advisors, librarians, fellow students)?

This self-assessment can be an important first step toward making the scholarly writing process introduced below (and described in detail in the chapters that follow) work for you.

The Scholarly Writing Process

As we see it, there are five stages to the scholarly writing process:

1. Thinking
2. Preparing
3. Executing
4. Refining
5. Finishing

You will notice that the chapters in this book are organized around these stages, and that is no accident. Even though we have identified these five stages as a broad organizational tool, these are not steps that you will move through, one-by-one, finishing one completely before you start the next. The scholarly writing process is recursive, and the stages give you a structural guide to your progress. You are probably in the Thinking stage now, and it is in many ways the most important stage. Good writing comes from good thinking, and it is

worth spending due time during this stage because you want to come up with a topic and thesis that are interesting to you. You will work on this scholarly writing project for a long time, and writing on an undesirable topic will only make the experience more challenging. You may want to work on establishing relationships during this stage–with law librarians, supervising faculty, senior law students as appropriate, and other people you may want to rely on throughout your scholarly writing process. We will discuss this stage in more detail in Chapter 2.

The Preparing stage is a time to continue thinking about your topic and thesis, but here you will engage with your topic and thesis through in-depth research. During this stage, you will fully research your topic and thesis, with the ultimate goal of developing the requisite amount of expertise on your topic as described in Chapter 3.

The next two stages, Executing and Refining, are where you will do the bulk of your writing. During the Executing stage, covered in further detail in Chapter 4, you will plan and write your first draft and any accompanying interim assignments. This is the time to think about large scale organization and begin to put together the pieces of your paper. Your goal during this stage is to develop a good working draft which you can take to the next stage.

The Refining stage is a time for evaluation, where you will step back from your project and look at it with fresh eyes. You will use this stage to identify gaps in your writing, places where you need to more fully explain a point, or perhaps have written too much. During this stage, you will critically evaluate your thesis by asking whether it is clear, and revise your paper to more fully support your thesis. You may also decide to rework the organization of your paper after seeing it as a whole draft. In Chapter 5, we discuss specific guidance and strategies for you to use during the Refining stage. As discussed further in Chapter 6, the Refining stage is also a time for you to receive and incorporate feedback (including peer edits and faculty comments) to shape and reshape your arguments in support of your thesis, leading to an overall stronger paper.

The final stage, Finishing, is covered in the two final chapters of the book. This stage is where you will focus on proofreading and polishing your paper. This stage is intended to emphasize technical edits, and focus less on the substantive aspects of your paper, which should be in good shape by the time you get to Finishing. In Chapter 7, we identify common errors in scholarly writing and offer self-editing strategies for preparing your final paper. In Chapter 8, we discuss taking your paper beyond the initial task and considering other publication options. We include in Chapter 8 results of our survey of law review editors to determine what criteria are relevant and most important in the publication selection process.